Niblock Excavating, Inc. ***and*** **International Union of Operating Engineers, Local Union 150, a/w International Union of Operating Engineers, AFL–CIO and Christian Labor Association, Party-in-Interest.** Cases 25–CA–26323, 25–CA–26677, 25–CA–26881, 25–CA–27150–1, and 25–CA–27232–1

December 21, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On May 15, 2001, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent, General Counsel, and Charging Party filed exceptions and supporting briefs, the General Counsel and Respondent filed answering briefs, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified[3] and set forth in full below.

This case arises in the context of an organizational campaign conducted by the Charging Party among the employees of the Respondent, an excavating and paving contractor with facilities in Bristol and Columbia City, Indiana. The judge found that, in response to the Charging Party's campaign, the Respondent restrained and coerced employees in the exercise of their statutory rights in violation of Section 8(a)(1) of the Act, rendered assistance and support to a rival labor organization in violation of Section 8(a)(2), and discriminated against employees in violation of Section 8(a)(3).

As discussed below, with but one exception, we adopt the judge's decision in all material respects. In so doing, however, we find it unnecessary to pass on certain of the issues raised by the parties' exceptions.

1. The General Counsel excepts to the judge's failure to find that the Respondent violated Section 8(a)(1) when it announced at an antiunion meeting that it would increase its contribution to the employees' 401(k) plan. We find merit to the exception.

The complaint alleged that on about September 15, 1999, the Respondent violated Section 8(a)(1) by promising its employees increased contributions to their 401(k) plan if the employees rejected the Union as their collective-bargaining representative. The judge stated that the "record does not support this allegation with regard to September 15, or any other date." We disagree. Indeed, the judge specifically found that at a captive audience meeting on August 24, 1999, attended by the Respondent's owners, Richard and Gary Niblock, a bank representative announced that the Respondent was doubling its contribution to the 401(k) plan.[4] The judge also found that approximately 6 months earlier, in early February 1999, both the Charging Party and the Christian Labor Association (CLA) filed representation petitions with the Board. (No election has been conducted due to the instant unfair labor practice charges.)

As a general rule, an employer's legal duty in deciding whether to grant improvements while a representation proceeding is pending is to decide that question as it would if the Union were not on the scene. *Great Atlantic & Pacific Tea Corp.*, 166 NLRB 27, 29 fn. 1 (1967). In determining whether a grant of benefits is unlawful, "the Board has drawn the inference that benefits granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits." *Lampi, L.L.C.*, 322 NLRB 502 (1996), quoting *United Airlines Services Corp.*, 290 NLRB 954 (1988).[5]

[1] The Respondent moved to strike the General Counsel's exceptions 1–5 on the ground that they do not comply with Sec. 102.46(b)(1)(iii) of the Board's Rules in that they do not designate by precise citation the portions of the record relied on. We deny the motion to strike because we find that the General Counsel's exceptions and supporting brief are in substantial compliance with the Board's Rules.

[2] The Respondent, the General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge identified Michael Lucas as an International representative of the Charging Party. In fact, Lucas is employed by the Charging Party as a consultant.

[3] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

We shall also modify the judge's recommended Order and notice to conform to the judge's findings of fact and conclusions of law.

Finally, the General Counsel excepts to the judge's characterization of owner Richard Niblock's physical conduct against employee Larry Corbiel, as a "touching"of Corbiel "in a hostile manner." Niblock put his finger in the crease of Corbiel's nose, pushed his head back and drew blood. The General Counsel asserts that the appropriate characterization of Niblock's action is "inflicting bodily injury." We find merit in the General Counsel's exception and shall modify the judge's conclusions of law, recommended Order, and notice accordingly.

[4] This matter was fully litigated at the hearing, and there is no evidence or contention that the Respondent was prejudiced by the minor variance between the date alleged in the complaint and the date established by the proof.

[5] Although *Lampi*, supra, and *United Airlines Services Corp.*, supra, concerned whether a grant of benefits is objectionable in the representa-

Here, the Respondent has failed to establish a legitimate reason for the timing of the announcement and has therefore failed to rebut the inference that the announcement was intended to induce employees to abandon their support for the Union. Under these circumstances, we find that the Respondent's promise of an increased contribution to the employee 401(k) plan violated Section 8(a)(1) of the Act. *Speco Corp.*, 298 NLRB 439 fn. 2 (1990).

2. The Respondent has excepted to the judge's findings that Superintendent Richard Bunn was a statutory supervisor and agent of the Respondent. We adopt the judge's finding that Bunn was the Respondent's agent and that the Respondent is therefore responsible for his actions and conduct. Consequently, it is unnecessary for us to resolve the issue of Bunn's supervisor status.[6]

3. The Respondent has excepted to the judge's findings that employee Chad Leiby was its agent and that, based on Leiby's conduct, it provided unlawful assistance and support to the CLA in violation of Section 8(a)(2) and (1) of the Act. We find it unnecessary to pass on these findings because we agree with the judge that the Respondent rendered unlawful assistance and support to the CLA by the conduct of its other agents, including Bunn. The finding of an additional 8(a)(2) violation based on Leiby's conduct would be cumulative and would not affect the Order.

4. The General Counsel excepts to the judge's failure to find that on two occasions in May 1999, Respondent's supervisors instructed employees not to talk about the Union on company time. We find it unnecessary to pass on the issues the General Counsel's exception raises. Given that we are adopting the judge's finding that the Respondent violated Section 8(a)(1) by Superintendent John Bowen's instruction to employee Larry Corbiel that he not discuss the Union with other employees, the additional 8(a)(1) findings sought by the General Counsel would be cumulative and would not affect the Order.

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 4.

"4. On about October 14, 1999, by Richard Niblock, by threatening and inflicting bodily injury on Larry Corbiel due to his union activities."

ORDER

The National Labor Relations Board orders that the Respondent, Niblock Excavating, Inc., Bristol, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union support or union activities.

(b) Instructing employees not to discuss the International Union of Operating Engineers, Local Union 150, a/w International Union of Operating Engineers, AFL–CIO.

(c) Promising employees benefits if they withdraw their support from the Union.

(d) Informing employees that they had been laid off, demoted, and denied a raise because of their union support or union activities.

(e) Sending letters to employees instructing them to report to their foreperson if they feel threatened or harassed by employees soliciting them to sign union cards.

(f) Threatening employees with discharge and unspecified reprisals because of their union support or union activities.

(g) Inflicting bodily injury on employees because they support the Union.

(h) Promising employees increased contributions to their 401(k) plans in order to induce employees to abandon their support for the Union.

(i) Photographing or videotaping employees engaged in lawful picketing without proper justification, or in any other manner placing their union activities under surveillance.

(j) Rendering assistance and support to the Christian Labor Association or any other labor organization.

(k) Promulgating, maintaining, or enforcing hiring policies for the purpose of discouraging union activities, including the refusal to accept employment applications, considering employment applications for only 30 days, purporting to hire only former employees, friends of employees, or students, and purporting to favor employees with no experience over union supporters with experience.

(l) Requiring employees to submit to drug testing because of their union support or union activities.

(m) Changing employees' work assignments, refusing to assign winter work, and denying wage increases to employees because of their union support or union activities.

(n) Suspending, discharging, refusing to hire or consider for hire, or otherwise discriminating against employees for supporting the Union or any other labor organization.

(o) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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tion context, the Board applies the same test in unfair labor practice cases. See *Lampi*, 322 NLRB at 502 fn. 4, and cases there cited.

[6] Chairman Hurtgen, in agreement with the judge, concludes that Superintendent Richard Bunn was a statutory supervisor.

(a) Within 14 days from the date of this Order, rescind the February 8, 1999 letter instructing employees to report to their foreperson if they feel threatened or harassed by employees soliciting them to sign union cards.

(b) Within 14 days from the date of this Order, rescind its policy of refusing to accept employment applications, considering applications for only 30 days, purporting to hire only former employees, friends of employees, or students, and purporting to favor employees with no experience over union supporters with experience.

(c) Within 14 days from the date of this Order, reinstate its prior policy that applications will remain on file for 6 months.

(d) Within 14 days from the date of this Order, offer Kevin Weickart full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Within 14 days from the date of this Order, offer Michael Cramer full reinstatement to his former job of paver operator or, if that job no longer exists, to a substantially equivalent position, and offer to assign him winter work at the levels that existed before the discrimination against him, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Kevin Weickart and Michael Cramer whole for any loss of earnings and other benefits suffered as a result of the unlawful suspension and discharge of Weickart and the unlawful demotion, layoff, and denial of wage increases to Cramer, in the manner set forth in the remedy section of the decision.

(g) Within 14 days from the date of this Order, offer job applicants Michael Young, Brandon Taylor, Randall Patton, Thomas Geffert, Randy Hill, Michael Kresge, Philip Overmyer, Delbert Watson, and Kenneth Welsh instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled absent the discrimination against them.

(h) Make the employees named in paragraph 2(g) whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(i) Within 14 days from the date of this Order, remove from its files the following: any reference to the unlawful drug testing of Rick Storm; any reference to Kevin Weickart's refusal to take the drug test and the unlawful suspension and discharge of Weickart for his refusal to do so; any reference to the unlawful demotion, layoff, and denial of wage increases to Michael Cramer; any reference to the unlawful refusal to hire and consider for hire Michael Young, Brandon Taylor, Randall Patton, Thomas Geffert, Randy Hill, Michael Kresge, Philip Overmyer, Delbert Watson, and Kenneth Welsh; and within 3 days thereafter notify them in writing that this has been done and that the discriminatory actions will not be used against them in any way.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its facilities in Bristol and Columbia City, Indiana, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 1999.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT instruct you not to discuss the International Union of Operating Engineers, Local Union 150, a/w International Union of Operating Engineers, AFL–CIO.

WE WILL NOT promise you benefits if you withdraw your support from the Union.

WE WILL NOT inform you that you have been laid off, demoted, or denied a raise because of your union support or union activities.

WE WILL NOT send you letters instructing you to report to your foreperson if you feel threatened or harassed by employees soliciting you to sign union cards.

WE WILL NOT threaten you with discharge and unspecified reprisals because of your union support or union activities.

WE WILL NOT inflict bodily injury on you because you support the Union.

WE WILL NOT promise you increased contributions to your 401(k) plan in order to induce you to abandon your support for the Union.

WE WILL NOT photograph or videotape you engaging in lawful picketing without proper justification, or in any other manner place your union activities under surveillance.

WE WILL NOT render assistance or support to the Christian Labor Association or any other labor organization.

WE WILL NOT promulgate, maintain, or enforce hiring policies for the purpose of discouraging union activities, including refusing to accept employment applications, considering employment applications for only 30 days, purporting to hire only former employees, friends of employees, or students, and purporting to favor employees with no experience over union supporters with experience.

WE WILL NOT require you to submit to drug testing because of your union support or union activities.

WE WILL NOT change your work assignments, refuse to assign you winter work, or deny you a wage increase because of your union support or union activities.

WE WILL NOT suspend, discharge, refuse to hire or consider for hire, or otherwise discriminate against any of you because you support the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the February 8, 1999 letter instructing you to report to your foreperson if you feel threatened or harassed by employees soliciting you to sign union cards.

WE WILL, within 14 days from the date of the Board's Order, rescind our policy of refusing to accept employment applications, considering employment applications for only 30 days, purporting to hire only former employees, friends of employees, or students, and purporting to favor employees with no experience over union supporters with experience.

WE WILL, within 14 days from the date of the Board's Order, reinstate our prior policy that applications will remain on file for 6 months.

WE WILL, within 14 days from the date of the Board's Order, offer Kevin Weickart full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Michael Cramer full reinstatement to his former job of paver operator or, if that job no longer exists, to a substantially equivalent position, and offer to assign him winter work at the levels that existed before the discrimination against him, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Kevin Weickart and Michael Cramer whole for any loss of earnings and other benefits suffered as a result of the unlawful suspension and discharge of Weickart and the unlawful demotion, layoff, and denial of wage increases to Cramer.

WE WILL, within 14 days from the date of the Board's Order, offer job applicants Michael Young, Brandon Taylor, Randall Patton, Thomas Geffert, Randy Hill, Michael Kresge, Philip Overmyer, Delbert Watson, and Kenneth Welsh instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges to which they would have been entitled absent the discrimination against them.

WE WILL make the above-named individuals whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the follow-

ing: any reference to the unlawful drug testing of Rick Storm; any reference to Kevin Weickart's refusal to take the drug test and to the unlawful suspension and discharge of Weickart for such refusal; any reference to the unlawful demotion, layoff, and denial of wage increases to Michael Cramer; any reference to the unlawful refusal to hire and consider for hire Michael Young, Brandon Taylor, Randall Patton, Thomas Geffert, Randy Hill, Michael Kresge, Philip Overmyer, Delbert Watson, and Kenneth Welsh; and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful actions will not be used against them in any way.

NIBLOCK EXCAVATING, INC.

Michael T. Beck and *Patricia H. McGruder, Esqs.*, for the General Counsel.
S. Douglas Trolson, Esq. (Hoffman, Drewry, Simmons), of Indianapolis, Indiana, and *Edward J. Chester, Esq.*, of Elkhart, Indiana, for the Respondent.
Michael D. Lucas, of Gainesville, Virginia, and *Melinda S. Burleson, Esq. (Baum, Sigman, Auerback, Pierson, Neuman & Katsaros, Ltd.),* of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in South Bend, Indiana, on January 22–26, 2001, and March 5 and 6, 2001. The charges were filed between November 16, 1998 and September 8, 2000. The consolidated complaint was issued September 26, 2000, and amended on November 16, 2000.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in road construction, the installation of underground utilities, and the manufacture of asphalt, with facilities at Bristol and Columbia City, Indiana. Niblock Excavating annually performs services, which are valued in excess of $50,000 in States other than Indiana, and purchases and receives goods at its facilities, which are valued in excess of $50,000, directly from points outside of Indiana. Niblock admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 150 of the International Union of Operating Engineers (the Union) is a labor organization within the meaning of Section 2(5) of the Act. I also find that the Party in Interest, the Christian Labor Association, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union embarked on an effort to organize Respondent by sending one of its members to work for Niblock in February 1998.[1] This employee obtained a job with Respondent and worked for several months without disclosing his union affiliation. In a possibly related endeavor, Michael Young, an organizer for Operating Engineers Local 103, went to Niblock's office in Columbia City, in response to a newspaper advertisement for a paver operator in March 1998. Richard Niblock, Respondent's secretary-treasurer, interviewed Young on or about March 19, 1998.[2] Young heard nothing further about his application.

In May 1998, union organizer Philip Overmyer passed out leaflets on a Niblock jobsite. He also went to Niblock's Bristol, Indiana office to apply for a job on May 21 of that month with eight other union members. When Overmyer returned to the office on May 28, a sign stating that Respondent accepted applications between 8–9 a.m. and 4–5 p.m. had been taken down and replaced by a sign stating that Niblock was not accepting applications.

In June, three Niblock employees, Larry Corbiel, David Taylor, and Rick Gorney, signed Local 150 authorization cards. They did not disclose their union sympathies to Respondent. In September, just before he quit his employment with Niblock, Rick Gorney wore a union T-shirt to work. At about this time, Richard Niblock held a foreman's meeting at which he discussed what supervisors and foremen could say to employees about the Union or unions. He used a flip chart on which he wrote the acronym "TIPS" for the prohibited practices of threats, interrogation, promises, and spying.[3]

The Layoff and Discharge of Gerald Mike Walton[4] (Complaint Pars. 7(a) and (b))

Gerald Mike Walton began working for Niblock Excavating on April 9, 1998. He was hired on the recommendation of

[1] The Union has tried to organize Niblock prior to 1998. For instance, Randy Patton, a member of the Union, who is also an alleged discriminatee in the instant case, worked for Respondent in 1994, as part of an organizing effort.

[2] Richard Niblock's brother, Gary, is president of Niblock Excavating.

[3] Among those attending this meeting were some or all operator-foremen, who the parties agree are not supervisors within the meaning of Sec. 2(11) of the Act. Operator-Foreman Wayne Andrews attended this meeting as did David Walter, a project superintendent, who, unlike other of Respondent's superintendents has not been alleged to be a "supervisor" or shown to be one. There is no evidence as to whether David Taylor and Todd Plank, operator-foremen sympathetic to the Union, attended this meeting.

[4] Walton's layoff and discharge are alleged to violate Sec. 8(a)(1) and (3) in complaint pars. 7(a) and (b). These are the earliest alleged unfair practice allegations that warrant analysis. Complaint pars. 5(a), (b), and (c) relate to testimony from union supporters David Taylor and Larry Corbiel about conversations they had with Superintendents John Bowen and Garry Garrett. Bowen and Garrett deny these allegations and I find their denials at least as credible as the allegations by Taylor and Corbiel. Therefore, I conclude that the unfair practice violations alleged in pars. 5(a)–(c) have not been established.

operator-foreman David Taylor.[5] Walton had no prior construction experience, but did have a class A commercial drivers' license (CDL). From April until sometime in September or October 1998, Walton worked mostly, if not exclusively, for Operator-Foreman Ron Yoder, whom in turn was supervised by Superintendent Gary Garrett.

Walton's job performance, which included driving a truck and laboring, was satisfactory until September or October, when he sustained some sort of physical injury, which he testified was a pinched nerve.[6] Walton submitted a physicians' note to Respondent and he was placed on an informal light-duty status. According to Yoder, Walton "did what he could." However, Yoder asked Garrett to switch Walton to another crew. At about this time Walton signed a union authorization card. However, he never openly proclaimed or revealed his union sympathies or affiliation.[7]

Garrett then assigned Walton to a crew supervised by Estimator Kevin Crouch. Crouch describes Walton's work as "a little slow" and "slow . . . not very productive." Crouch's foreman was Todd Plank, who later signed a union authorization card. Plank described Walton's work as, "slow but steady" and said Walton did not shovel and clean up around curbs as fast as other employees.

On October 15, 1998, Walton was transferred to a crew under the supervision of Underground Superintendent John Bowen. The operator-foreman of this crew was Mike Schaeffer. Walton worked for Schaeffer for about 4 weeks. He performed light-duty work including hooking up PVC pipe and light shoveling. Schaeffer recalled that if Walton was absent from work he had a doctor's excuse. As to Walton's job performance, Schaeffer testified:

> He tried. . . . It was the things we had to do . . . put fittings in the ground and do some shoveling stuff, it was just a job that he couldn't handle real well at the time because of his health condition and the job was wearing him down and I really did not need a fifth man at the time.

(Tr. 811.)

Walton also worked for operator-foreman Doug Andrews, who did not testify at the hearing.[8] On November 10, 1998, all members of Andrews' crew were sent home due to rain except for Walton, who was required to sweep Niblock's shop in order to receive his "show-up" pay. A week later on November 17, 1998, Superintendent John Bowen informed Walton that he was being laid off due to lack of initiative.

On about December 18, 1998, Walton attended Respondent's Christmas party. Richard Niblock was very upset by the fact that Walton was present. The next day, Respondent sent Walton a letter informing him that he had been discharged. During Walton's employment with Niblock he never received any discipline of any kind.

The General Counsel alleges that both Walton's November 1998 layoff and December 1998 discharge were discriminatorily motivated and thus violated Section 8(a)(3) and (1). To establish such a violation, the General Counsel must show that union activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity, and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus, and discriminatory motivation may be drawn from circumstantial evidence as well as from direct evidence.[9] Once the General Counsel had made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981).

Gerald Walton engaged in union activity by signing a Local 150 authorization card. Respondent demonstrated a great deal of animus towards the organizing efforts of Local 150 and its supporters. However, there is no credible direct evidence that Respondent knew of Walton's union sympathies and affiliation. I also find that there is insufficient circumstantial evidence that Niblock knew or suspected Walton of prounion sympathies.

The General Counsel has also failed to establish that Gerald Walton's layoff and discharge were discriminatorily motivated. There is no credible direct or circumstantial evidence, such as suspicious timing, that suggests discrimination with respect to Walton's layoff. In the last 2 months of his employment, Gerald Walton was not a very productive employee. I cannot conclude that he was laid off for pretextual reasons because Walton was unable to adequately perform much of the work assigned to him.

In the absence of evidence that Niblock had received any additional information regarding Walton's union affiliation and sympathies, I find that Richard Niblock's reaction to Walton's presence at the company Christmas party does not warrant an finding of discriminatory motivation with regard to the discharge. It is equally likely that Niblock became upset because he had assumed that when John Bowen told Walton that he was being laid off for lack of initiative, that Walton would understand that Respondent did not want him to return to work for it in the future.

[5] Taylor revealed his union sympathies to Respondent at the beginning of February 1999.

[6] Ron Yoder testified that Walton told him that Walton had had a stroke.

[7] I credit Ron Yoder's testimony that he did not offer Walton a Niblock T-shirt and that Walton never told him that he'd prefer a T-shirt like Gorney's (a union T-shirt).

[8] Bowen testified about complaints he received from Doug Andrews about Walton's performance. As Doug Andrews still works for Respondent, I decline to give this testimony any weight regarding the quality of Walton's work. I infer that it was as described by Schaeffer and Plank; slow and adversely impacted by a physical problem of which Respondent was aware.

[9] *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995).

Respondent's Alleged Refusal to Hire/Refusal to Consider for Hire Michael Young (Complaint Par.7 (c)); Discriminatory Enforcement of Niblock Hiring Procedures (Complaint Par. 7(d))

In late January 1999, Michael Young, the Local 103 organizer who had applied for work at Niblock's Columbia City facility in March 1998, attended an organizer's conference in Joliet, Illinois. Young learned of Local 150's efforts to organize Niblock and mentioned his attempt to secure employment with Respondent. Young, Philip Overmyer, and International Representative Michael Lucas decided that Young should reapply for work at Columbia City.

When Young arrived at Respondent's Columbia City office, he noticed a sign in the window stating that Respondent was not accepting applications as of March 16, 1998, which was the date that he previously applied for work. Young entered the office and told Respondent's secretary that he had applied for work a year previously and hadn't heard anything. She allowed him to fill out an application and turn it in. Respondent's secretary told Young that Niblock was now keeping applications for only 30 days; at the time he applied in 1998, Niblock kept applications for 6 months. Young did not receive any response to his application.

One month before Young applied, Mike Wirick, Respondent's paving foreman at Columbia City, called Steven Storm, an experienced paver operator, with whom Wirick had worked previously, and asked Storm if he would consider going to work with Niblock to operate a paving machine. Storm declined the offer. In April 1999, Respondent hired Rick Storm, Steve Storm's brother, to operate the paver at Columbia City. Rick Storm was not an experienced paver operator.

Applicable Legal Principles

In *FES*, 331 NLRB 9 (2000), the Board set forth the analytical framework for refusal-to-hire violations. The General Counsel must show that:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

In contrast, to establish a discriminatory refusal to consider, the General Counsel must show that (1) the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

Once this is established, the burden shifts to the employer to show that it would not have considered the applicants even in the absence of their union activity or affiliation. Similarly, once the elements of a refusal-to-hire violation are established, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The Board stated further in *FES* that, in a discriminatory hiring case, whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits. The General Counsel must show that there was at least one available opening for the applicants. He must show at the hearing on the merits the number of openings that were available. However, where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings.

With regard to Michael Young, it has been established that Respondent was seeking to hire a paver operator when Young applied for work in January 1999.[10] Young was an experienced journeyman equipment operator with specific experience operating an asphalt paver. Whether antiunion animus contributed to Respondent's decision to not to hire Young or consider him for employment requires examination of its hiring policies in general, as well as its stated objections to hiring Young.[11]

Respondent contends that Young was not hired in 1998 because Ron Modglin, its Columbia City area manager, determined that Young misrepresented his working experience on his employment application. I find Modglin's testimony in this regard to be incredible and therefore pretextual. Although Young listed his most recent construction employer as a reference, Modglin did not contact this individual or any other of the employers Young listed on his application. Instead, he claims to have relied on a conversation with Steven Bunn, a cousin of Richard Bunn, Niblock's superintendent at Columbia City, who also worked for Young's most recent construction employer. Apart from the fact that I am not convinced that Modglin had any such discussion with Steven Bunn, Respondent made no showing that Steven Bunn had a basis for rendering any opinion as to Young's experience. I therefore find that Young was excluded from the hiring process in 1998 for unlawful reasons.

The violation at issue, however, is Respondent's refusal to consider Young for employment and/or hiring him in 1999. To the extent that Respondent relies on Modglin's assessment of Young's veracity, I conclude such reliance to be pretextual. On this basis I find that the General Counsel has established that Young was not considered for hire and was not hired for dis-

[10] Alan Mike Wirick, Respondent's paving foreman at Columbia City, was and is an agent of Respondent. Employees and potential employees would reasonably believe that Wirick was reflecting company policy and speaking and acting for management, generally and when soliciting individuals for employment, *Community Cash Stores*, 238 NLRB 265 (1978). Wirick did not testify at this proceeding and thus the testimony of Steve and Rick Storm regarding their conversations with him are unrebutted.

[11] Neither Richard Niblock nor Ron Modglin asserted that it relied on the prohibition against Niblock employees working for another employer which appears in its company hiring policies. Young's 1998 application shows clearly that he was still employed by Local 103. Modglin asked Young if he wanted a job in order to organize Respondent. Young denied this was the case and Modglin arranged for him to be interviewed by Richard Niblock. There is no indication that Respondent told Young he would have to quit his job with Local 103 to work for Niblock.

criminatory reasons.[12] As demonstrated by the hiring of Rick Storm in April 1999, there was a job opening for Young.

Between March 16 and May 22, 1998, Respondent adopted a policy that employment applications would remain on file for 30 days, rather than for 6 months. I conclude that this change was made in response to Young's attempt to gain employment in March 1998 and was thus discriminatorily motivated. Moreover, while there is no indication that Niblock hired anyone within 30 days of Young's 1999 application, Respondent was actively recruiting an experienced paver operator for Columbia City. Therefore, I conclude there was a position available for Young and that if Respondent had considered his application on a nondiscriminatory basis, it would have hired him within 30 days of his application. I therefore find that Respondent refused to hire Young on the basis of his union affiliation and activities.

Respondent also contends that Young and the other union applicants were not hired or considered for employment because Niblock does not accept applications and because it only hires former employees, friends of employees or students.[13] Part of this defense is not available with respect to Young, since Niblock in fact accepted his January 1999 application.

Moreover, the policy of not accepting applications was adopted within days of the May 22, 1998 visit to Respondent's Bristol office by nine union applicants. I find that this policy was discriminatorily motivated and therefore violated Section 8(a)(3) and (1) when applied to union applicants in 1999.[14] Where an employer implements a rule with the purpose of restricting or preventing employees from engaging in protected activity, Section 8(a)(1) of the Act has been violated, *Tualatin Electric*, 319 NLRB 1237 (1995). The policy of hiring only referrals, friends of current employees, students, and others known to the Niblocks was also implemented to thwart the Union and has also been applied in a discriminatory fashion. It therefore violates the Act.[15] Finally, the policy of retaining employment applications for only 30 days, which was adopted in response to Michael Young's March 1998 application also violated Section 8(a)(3) and (1) when applied to applicants in 1999 and 2000.[16]

February 1999: the Union Openly Solicits Employees; the Christian Labor Association is Contacted and Conducts its Meetings with Niblock Employees

On or about February 2, 1999, union organizers Philip Overmyer and Thomas Geffert accompanied Niblock employees David Taylor and Larry Corbiel and visited the homes of a number of other Niblock employees to encourage them to sign Local 150 authorization cards. One of these employees contacted Operator-Foreman Ron Yoder immediately after the visit.[17]

Within 24 hours of this call, a number of the operator-foreman met with each other to discuss the Local 150 organizing drive. They also met with Richard and Gary Niblock. I infer from the testimony of the three operator-foremen called as witnesses by Respondent: Wayne Andrews, Mike Schaeffer, and Ron Yoder, that the CLA organizational effort began at this meeting. None of Niblock's employees had expressed any interest in joining the CLA until these foremen found out about the Local 150 house calls.

The operator-foremen who met with the Niblocks were opposed to the presence of a union at Niblock Excavating, but, as the following testimony shows, they decided, in the presence of Richard and Gary Niblock, on the CLA as a vehicle to stop Local 150:

> They [Richard and Gary Niblock] just said that the 150 was trying to organize within the company and said that there are options that we have to choose from and that it was our choice to discuss those options and decide on those options.
>
> Q. Did they mention the CLA?
>
> A. That was talked about amongst the group that was one of the options.

(Tr. 768–769 (Wayne Andrews).)[18]

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[12] Ron Modglin hired Glenn Brickley, a member of Operating Engineers Local 103, in the spring of 1998. I find this fact irrelevant to the issue of whether Respondent discriminatorily refused to consider for hire or hire Michael Young. First of all, Brickley was not an organizer and there is no indication that Respondent was aware of the renewed effort of the Operating Engineers to organize its employees when Brickley was hired. From Modglin's testimony at Tr. 1101, I infer he had no concerns that Brickley was going to engage in organizing activities when he hired him.

[13] Richard Niblock described the policy as including individuals that he and his brother "know of . . . that wants a job or they happen to stop in and talk to us or something. [Tr. 29.]"

[14] The illegality of Respondent's hiring procedures is alleged as a violation in complaint par. 7(d). The fact that the General Counsel refused to proceed on a previous charge filed by the Union regarding the hiring policy does not preclude future proceedings which are otherwise litigable, *R. E. Dietz Co.*, 311 NLRB 1259, 1265 fn. 10 (1993); *Ball Corp.*, 322 NLRB 948, 951 (1997).

[15] It appears that the Union was first notified of this policy by the July 20, 1999 letter from the General Counsel's office of appeals. While Respondent has had a longstanding practice of hiring applicants referred by current employees, its policy or practice of *not considering* any applicant who does not have such a referral is recent (Tr. 29) and was implemented to thwart the organizing efforts of Local 150. Moreover, when discussing its decision to hire a number of its new employees, Respondent has failed to show that many of them were recommended or referred by anyone, let alone anyone who had any basis for concluding they were suitable for employment with Niblock (other than having no known association with Local 150). Among the new employees not shown to fit the alleged Niblock hiring criteria are: Kelly Moyer, Shane Stoppenhagen, Cynthia White, Ryan Anders, Stephanie Brown, David Burkey, Brodie Delcamp, Susan Dome, Juan Glassburn, Casey Grove, Jerry Gross, Robert Kuhn, David Malone, and Jeremy Walters. Thus, Respondent's policy or practice of excluding applicants who have not been recommended or referred by current employees has been applied on an inconsistent and discriminatory basis.

[16] This finding is significant in determining how many job openings were available for the six union salts who applied for work with Niblock on June 28, 2000 (see discussion of complaint par. 7(p) herein).

[17] David Taylor, like Respondent's witnesses Ron Yoder, Michael Schaeffer, and Wayne Andrews, is an operator-foreman, which the parties agree is not a supervisory position as defined by the Act.

[18] While Andrews testified that the Niblocks did not tell the foremen to contact the CLA, he concedes that the CLA was discussed in the presence of Richard and Gary Niblock. From this, I infer that represen-

> They [Richard and Gary Niblock] just told us that it was the employees' choice to either—they could either join—[be] represented by the 150, represented by the CLA, or we could represent ourself as a non-union. It was our choice and that was it.

(Tr. 828, Mike Schaeffer); (also see Tr. 865–866 Ron Yoder).[19]

operator-foreman Ron Yoder immediately contacted Michael Koppenol, a representative of the CLA, and scheduled a meeting right after work on February 4, 1999, at the Evans Cow Bell restaurant in Bristol. Yoder arranged this meeting on short notice because he did not want Local 150 to organize Respondent. A number of Niblock employees who were on their winter layoff were contacted and attended this meeting. Ron Yoder also called Chad Leiby, a rank-and-file employee, who was visiting relatives in Cincinnati. Leiby, who had worked for Niblock since 1985, was still on layoff status.

Yoder told Leiby that he should return to Bristol because Larry Corbiel was trying to help Local 150 organize Niblock. Upon his return, Leiby was selected to spearhead the effort to garner support from Niblock employees for the CLA. Leiby kept Richard Niblock informed of every decision that he made with regard to the CLA, by calling him after work (Tr. 906, 923–924). The first of these decisions was to arrange a meeting for employees with CLA representatives at the Eby Pines restaurant/roller skating rink in Bristol on February 11. Most of Niblock's employees from Bristol and Columbia City attended this meeting. Also in attendance was Richard Bunn, a superintendent who works at Columbia City. Bunn encouraged Columbia City employees to sign authorization cards for the CLA.[20]

tation by the CLA was first broached by either Richard or Gary Niblock. I see no reason why employees opposed to unionization would otherwise decide to contact the CLA. My inference in this regard is also based on Chad Leiby's testimony at Tr. 917, that when Yoder called him he "did not want anything to do with any union." Leiby then testified in a most incredible fashion that he decided that he wanted to be represented by the CLA after reading an NLRB brochure.

[19] Contrary to Schaeffer's testimony, I find he was at the meeting with the Niblocks on or about February 3, 1999, about which Wayne Andrews testified. The account of no other meeting fits the description of the one at which the Niblocks discussed the CLA.

In relying on the testimony of Andrews, Schaeffer, and Yoder regarding the origins of the CLA organizational effort, I rely also by the fact that Richard Niblock was called as a witness by Respondent after these employees testified. He made no effort to contradict them and did not deny that he and his brother met with the operator-foremen soon after learning of the Local 150 house calls and that he discussed the possibility of the employees choosing the CLA as their bargaining representative in this meeting or meetings.

[20] See complaint par. 6(a). Larry Corbiel's testimony in this regard is unrebutted. Respondent did not call Bunn as a witness. He was called as an adverse witness by the General Counsel to testify regarding his status. However, all of the testimony in this record regarding things said by Bunn is uncontradicted. In addition to the CLA meetings, Bunn attended a Local 150 meeting and was not asked to leave.

Respondent's February 8, 1999 Letter to Employees
(Complaint Par. 5(d))

At the same time that Niblock employees were being invited to the CLA meeting at Eby Pines, Richard Niblock sent them a letter dated February 8, which said:

> A number of employees have told us that they have felt pressured and harassed by Union agent[s] asking them to sign a Union Authorization Card. They have asked us what rights they have in this regard. We want all of our employees to know that the decision to sign a Union Authorization card is solely your decision. You have the right to sign a card or not sign a card as you see fit. Nobody, including the Union has the right to pressure you or harass you about signing those cards. Nobody has the right to come on to your property or into your home to ask you to sign a card unless you let them. If you feel threatened or harassed during your working hours we urge you to report this to your foreman, and the problem will be immediately addressed. If this occurs during non-working hours you have every right to call the police, just like anyone who is harassed or threatened by another person.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act in sending this letter to its employees.[21] The Board has held that similar letters were unlawful because they have the potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach them in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities.

Niblock's letter, by equating "pressure," "threats," and "harassment" could be interpreted by some employees to cover lawful attempts by union supporters to persuade employees to sign union authorization cards.[22] This is particularly true since there is no credible evidence that Local 150 supporters employed any unprotected tactics in soliciting support for the Union. Thus, Niblock's letter would tend to restrain union supporters from attempting to persuade any employee to sign an authorization card for fear that they would be reported to management and disciplined, *Arcata Graphics*, 304 NLRB 541, 542 (1991); *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 238 (1998). I therefore find that Respondent violated the Act as alleged in complaint paragraph 5(d).

Additional Meetings

February 23, 1999 Meeting at the Bristol Missionary Church
(Complaint Par. 6(b))

Chad Leiby informed Niblock employees that another meeting would be held on February 23, at Respondent's Bristol

[21] This letter, GC Exh. 27 obviously refers to solicitations on behalf of Local 150, and not to solicitation on behalf of the CLA.

[22] While an employer may prohibit the discussion of non work-related topics during working time, it cannot limit such a prohibition to unions or other protected subjects, *Altorfer Machinery Co.*, 332 NLRB 130, 133 (2000); *M. J. Mechanical Services*, 324 NLRB 812 (1997). There is no evidence that Respondent prohibited employees from discussing nonwork-related topics. Thus, it could not prohibit employees from either encouraging co-workers from supporting the Union during worktime or discouraging coworkers from doing so.

office. However, the location was changed to the Bristol Missionary Church, at which Leiby was a parishioner. Employees were informed of the change in a variety of ways. Niblock's secretary called some employees and operator-foreman Ron Yoder remained in the parking lot at Niblock's office to direct employees to the church. Columbia City employees and Superintendent Richard Bunn attended this meeting. A representative of the bank, which manages Niblock's 401(k) pension plan, and a representative of Niblock's health insurance carrier compared Niblock's benefits to what Local 150 was offering.

At Chad Leiby's suggestion, the employees broke up into groups by occupation—equipment operators, laborers, truck drivers, operator-foremen, etc. Each group selected a chairman. This chairman was designated as the group's representative for matters pertaining to the CLA. Paver Operator David Bogner was selected as the CLA representative for Columbia City. Richard Bunn was part of the operator-foreman group, not the group of rank-and-file Columbia City employees. He participated in the selection of a chairman for the operator-foremen. Chad Leiby then distributed a sheet of wage and benefit figures for different job classifications that would be acceptable to Niblock Excavating if employees chose the CLA as their collective-bargaining representative.

Evidentiary Basis for Findings Relating to the February 23 Meeting

The most thorough and accurate account of the February 23 meeting, I believe, is that of David Taylor, which is uncontradicted. Taylor testified at Transcript 390 that "we voted on this wage package that we were suppose to send to the Niblock boys." At Transcript 248 Larry Corbiel testified that the CLA was not discussed at the meeting, but his testimony on the next page is consistent with that of Taylor:

> Chad Leiby had a handout that he said he'd received—I wouldn't say he said received, but that Niblock's would agree to, we just had to sit down and vote on it, and the way it was broke down is they put all the operating foremen at one table and then all the operators, laborers, truck drivers, and pit personnel.

Operator-Foreman Wayne Andrews, called by Respondent, confirms that a wage and benefit plan was reviewed by the employees in these groups and that this plan was put together by Chad Leiby. It is clear from the context of his testimony that this plan related to how the employees would be compensated if they chose the CLA as their bargaining representative. Given Chad Leiby's testimony that he kept Richard Niblock informed of everything he was doing, I infer that Niblock knew about the wage proposals presented at the February 23 meeting beforehand and that Leiby knew when he presented them that they would be acceptable to Niblock.

The CLA Meeting at Connie's Corner Restaurant in Columbia City (Complaint Par. 6(c))

A few days after February 23, Chad Leiby traveled from Bristol to Columbia City in a company vehicle.[23] Either prior to his trip or after he arrived in Columbia City, Leiby told Respondent's area manager, Ron Modglin, and Superintendent Richard Bunn that he wanted to meet with Niblock's Columbia City employees on CLA business and that he would distribute CLA authorization cards at this meeting. He had either Modglin, Bunn, or their secretary arrange for this meeting to be held at Connie's Corner restaurant in Columbia City, or asked them to recommend a convenient place to meet. Respondent's secretary and/or Bunn and/or Modglin informed employees of the meeting. Leiby arrived in Columbia City between 8:30 and 9:30 a.m. As Leiby is an hourly employee, I assume he was paid by Niblock for all the time he spent in Columbia City. Several hours after Leiby arrived, he and Bunn drove to Connie's Corner restaurant in a Niblock company truck.[24]

Employees ate lunch at the restaurant, which Leiby paid for with funds he had received from the CLA. After lunch, Leiby addressed the Columbia City employees and told them that it would be difficult for paver operator David Bogner to serve as their CLA representative. Leiby explained that due to the paver operator's importance to production, he would not be able to attend CLA meetings that were held during working hours or be able to leave work early to attend CLA meetings in Bristol.[25] Leiby suggested that the employees select a different CLA representative. Operator-Foreman Mike Wirick suggested employee Chad Rice. Superintendent Richard Bunn seconded the suggestion and Rice became the CLA representative for Columbia City.

Evidentiary Basis for the Above Findings Regarding the Meeting in Columbia City

Chad Leiby's testimony is riddled with inconsistencies. However, I infer what transpired at the Connie's Corner meeting largely from his testimony, as well as the testimony of David Bogner. Leiby was called as a witness by Respondent, which elicited testimony from him about the Connie's Corner meeting on direct examination (Tr. 907).

At Transcript 912, Leiby denied knowing who David Bogner was. At Transcript 933, Union Representative Lucas asked Leiby if David Bogner had called him at home to discuss conversations Bogner had with Columbia City employees about his serving as CLA representative. Leiby testified that an employee from Columbia City called him, but that he did not remember his name. Lucas then asked whether Leiby told employees at the meeting at Connie's Corner that it would be very difficult for the paver operator to represent them in Bristol and that they should select somebody else. Leiby answered, "Yes, I

[23] Columbia City, which is west of Ft. Wayne, is about 55 miles from Bristol, via State route 15 and U.S. route 30. Bristol is east of South Bend and Elkhart, a few miles south of the Michigan/Indiana border.

[24] I credit David Bogner's testimony that Leiby and Bunn arrived at Connie Corner's together in a company truck.

[25] During good weather, Respondent's crews often work more than an 8-hour day.

think so." He confirmed that Chad Rice was nominated to be the alternate representative.

Lucas then asked whether Chad Rice was selected to be the alternate representative. Leiby replied, "David was the person that I talked to but then Chad got involved in it too and now as far as who elected him to do that, I don't know [Tr. 934]." At Transcript 936, I asked Leiby who was the David he had just referred to. Leiby answered, "He said David Bogner. Is that his name?" Then Leiby insisted that he had no recollection of David Bogner and was only familiar with the name because Lucas had brought it up (Tr. 934–936). I conclude that regardless of whether Leiby recalled his last name, that he knew that he had spoken with the paver operator named David and that Leiby went to Columbia City in part to replace "David" as the CLA representative with another Columbia City employee. I also credit David Bogner's testimony that Chad Rice was selected as the CLA representative for Columbia City in Leiby's presence and find incredible Leiby's testimony that he did not know who was selected or how Rice was selected.

At Transcript 937, Lucas asked Leiby, "Do you recall addressing, in particular, how difficult it would be if the paver operator were the representative who had to travel back and forth?" Leiby answered, "Being the paver operator that I was, yeah, I would address that . . . I would probably not agree with the paver operator being the representative." After my explanation to Leiby that he should only testify to that he recalls, he testified that he did not remember telling employees that the CLA representative should not be the paver operator.

On redirect examination, Leiby testified that when he asked Ron Modglin for a recommendation as to a restaurant, he did not tell him the purpose of the meeting (Tr. 940). On recross-examination, his testimony was exactly the opposite:

> Q. You testified that you did not tell Mr. Modglin why you wanted to meet with the employees.
>
> Correct, in Columbia City?
>
> A. Yes.
>
> Q. Did Mr. Modglin ask why you wanted to meet with his employees?
>
> A. I would think he would, yeah.
>
> Q. But you do not remember if he did or he did not?
>
> A. He probably did.
>
> Q. What did you tell him?
>
> A. Exactly what I was doing.

(Tr. 944.)

In finding that Leiby regularly reported to Richard Niblock as to his activities on behalf of the CLA, I also rely on the fact that Respondent called Niblock as a witness after Leiby testified and made no effort to contradict him on this point. Likewise, Ron Modglin testified for Respondent after Leiby and did not contradict Leiby's testimony that he told Modglin "exactly what I was doing" when telling Modglin that he wanted to meet with Columbia City employees on or about February 25, 1999.

March 12, 1999 Meeting

Chad Leiby led another CLA meeting at his church on or about March 12, 1999. He had arranged for a notary public to be present. Employees were asked to sign a notarized statement as to whether or not they had signed a Local 150 authorization card.[26] Many, if not all, of the employees signed such affidavits. Based on Leiby's testimony that he kept Richard Niblock informed on every decision he made, I infer that Leiby reported the results of his survey to Richard Niblock. Both Local 150 and the CLA filed representation petitions with the Board in early February 1999. No election has been conducted due to the unfair labor practice charges filed by Local 150.

Respondent Violated Section 8(a)(2) and (1) of the Act in Rendering Unlawful Assistance and Support to the Christian Labor Association

Section 8(a)(2) provides that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." The allegations of the complaint and the arguments made in the General Counsel's brief are limited solely to assistance allegedly rendered by Richard Bunn at the CLA meetings of February 11 (at Eby Pines Restaurant), February 23 (in the basement of the Bristol Missionary Church), and on about February 25, 1999 (at Connie's Corner restaurant in Columbia City).

For reasons set forth later in this decision, I agree with the General Counsel that Richard Bunn was both a supervisor and an agent of Respondent in February 1999. I also agree that Respondent, by Bunn, rendered illegal assistance and support to the CLA by encouraging employees to sign CLA authorization cards at the February 11 meeting, by participating in the selection of a CLA representative for the operator-foremen at the February 23 meeting and by participating in the selection of a Columbia City representative for the CLA at the February 25 meeting. Moreover, Bunn's presence at the Columbia City meeting reasonably created the impression that the meeting was endorsed by Respondent and that Chad Leiby spoke of behalf of Niblock Excavating as well for himself and the CLA.

However, I find that Respondent violated Section 8(a)(2) in respects not alleged nor argued by the General Counsel, particularly with regard to the February 23 and 25 meetings. It has been established, largely by Chad Leiby, a witness called by the Respondent, on direct examination, that he conferred with Richard Niblock, on a regular basis, with respect to his activities on behalf of the CLA. From Leiby's testimony, it is also clear that he traveled to Columbia City primarily, if not exclusively, to do business on behalf of the CLA, while being paid by Niblock and with the knowledge and consent of Richard Niblock and Ron Modglin. Leiby also established that Respondent made the arrangements for the CLA meeting in Co-

[26] Seven witnesses testified as to what occurred at this meeting. Three of them, Larry Corbiel, Mike Schaeffer and Ron Yoder, testified that the notarized statement they signed also indicated whether they supported the CLA. Four of the witnesses, David Taylor, Todd Plank, Chad Leiby, and Superintendent David Walter testified that the statement only concerned whether or not they had signed an authorization card for Local 150. The fact that Walter, a witness called by Respondent, testified on direct examination that the statement only concerned whether the employee has signed a Local 150 card, persuades me that this is what transpired.

lumbia City, informed employees of the meeting and facilitated their presence at the meeting.

Additionally, through the testimony of Larry Corbiel and David Taylor, as well as the testimony of Respondent's witnesses Leiby and Wayne Andrews, I conclude that Leiby presented a wage and benefit package to Niblock employees on February 23, 1999, on behalf of the CLA and with the prior knowledge and approval of Richard Niblock. On the basis of these facts, I conclude that Chad Leiby was an agent of Respondent at the February 23 and Columbia City meetings, *Ella Industries*, 295 NLRB 976 fn. 2 (1989), *Einhorn Enterprises*, 279 NLRB 576 (1986); and *Ohmite Mfg*., 290 NLRB 1036 (1988).

A rank-and-file employee may become an agent of his employer via either actual or apparent authority, *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446 fn. 4 (1991); *Domsey Trading Corp.*, 310 NLRB 777, 801–802 (1993); and *Community Cash Stores*, 238 NLRB 265 (1978). Leiby had actual authority to act on behalf on Respondent through his regular consultations with Richard Niblock and through the tacit approval of his activities in Columbia City by Niblock, Ron Modglin, and Richard Bunn. Moreover, he also acted with the apparent authority of Respondent. When employees were summoned to Connie's Corner by Respondent's office personnel they would reasonably believe that Leiby was acting with Respondent's approval. Moreover, the presence of Superintendent Richard Bunn and his participation in the meeting would have reinforced that impression. Additionally, neither Modglin nor Bunn made any attempt to disabuse employees of this notion.

I therefore find that Respondent, in addition to violating Section 8(a)(2) by Richard Bunn, violated the Act by Chad Leiby and Richard Niblock in presenting a CLA wage and benefit package on February 23, which had been approved by Richard Niblock. I conclude that Respondent, through Chad Leiby, Richard Niblock, and Ron Modglin, violated Section 8(a)(2) in rendering assistance to the CLA in conjunction with the CLA meeting in Columbia City on about February 25, 1999.

The Assistance Rendered to the CLA by Richard Niblock, Ron Modglin, and Chad Leiby has been Fully Litigated and Respondent has been Afforded Due Process with Regard to these Issues

It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. This rule has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses, *Letter Carriers Local 3825(Postal Service)*, 333 NLRB 343 (2001); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); *Meisner Electric*, 316 NLRB 597 (1995); *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995); and *Williams Pipeline Co.*, 315 NLRB 630 (1994). Due process considerations are satisfied when unpled violations are found which have been fully litigated, *Seton Co.*, 332 NLRB 979, 981 fn. 9 (2000); *Forsyth Electrical Co.*, 332 NLRB 801 (2000).

In the instant matter the complaint alleged 8(a)(2) violations by virtue of assistance rendered to the CLA by Respondent at the February 11, 23, and 25, 1999 meetings. While the complaint alleges such assistance only by Richard Bunn, Respondent, through its witness Chad Leiby, established that Richard Niblock, Ron Modglin, and Richard Bunn were informed of his activities at these particular meetings on behalf of the CLA beforehand and that Leiby had at least their tacit approval for these activities. Through direct examination of its own witness and cross-examination to which it did not object, Respondent has established that Leiby was acting as its agent and that assistance was rendered to the CLA not only by Bunn, but also by Richard Niblock and Ron Modglin. Moreover, when calling Richard Niblock and Ron Modglin as witnesses after Leiby, Respondent made no attempt to contradict his testimony regarding his conversations with Niblock and Modglin. Finally, Respondent could have called Bunn as a witness to clarify or contradict its involvement with regard to the Columbia City meeting but chose not to do so.

April 1999 Alleged Refusal to Hire or Consider for Hire Philip Overmyer and Thomas Geffert (Complaint Par. 7(e))

The General Counsel alleges in complaint paragraph 7(e) that Respondent refused to hire or consider for hire applicants for employment Philip Overmyer and Thomas Geffert. David Taylor testified that on or about April 19, 1999, Niblock Superintendent Gary Garrett asked him if he knew anyone who was looking for a job. Taylor testified further that he referred him to organizers Overmyer and Geffert. Overmyer drafted a letter memorializing this conversation (GC Exh. 14) and Taylor testified that he gave it to Garrett.

Superintendent Garret denies that he had any discussions with Taylor hiring Overmyer and Geffert and that never received a letter from Taylor to that effect. Given the fact that the Union often sends such communications by certified mail and did not do so in this instance, I find that the General Counsel has not established that Taylor verbally recommended these organizers for employment in April 1999 or that Garrett ever received his letter. I therefore dismiss complaint paragraph 7(e).[27]

Respondent's August 24, 1999 Meeting at its Bristol Facility and August 31 Meeting in Columbia City (Complaint Pars. 5(g), (h), and (i))

On August 24, 1999, Gary and Richard Niblock conducted a meeting for Respondent's employees in the basement of its Bristol office. A bank representative discussed Respondent's 401(k) pension plan and informed employees that Respondent was increasing its contribution to the plan. After an antiunion video was shown, the Niblocks put a bag on "union no" buttons

[27] In contrast to the purported manner of delivery of GC Exh. 14, the June 2000 applications of union applicants were sent to Respondent via certified mail, return receipt requested. Alleged discriminatee Randy Patton also submitted his application via certified mail. Thus, when the Union wants to establish that its members applied for work with a nonunion employer, it knows how to do so.

on a table. They remained in the room while employees took the buttons.

The next week the Niblocks conducted an almost identical meeting in Columbia City. After the video was shown a bag of "union no" buttons were made available. Richard and Gary Niblock remained in the room while a number of the employees took the buttons. Three employees, Michael Cramer, Rick Storm, and Kevin Weickart did not take a button. An employer violates Section 8(a)(1) when it distributes antiunion paraphernalia in a manner pressuring employees to make an observable choice or open acknowledgement of their union sentiment, *A. O. Smith Automotive Products Co.*, 315 NLRB 994 (1994). Thus, as alleged in complaint paragraphs 5(g) and (h), Respondent violated the Act in distributing "union no" buttons in a manner in which an employee would effectively reveal his support for the Union to the Niblocks if the employee refused to take one.

Complaint paragraph 5(i) alleges that on about September 15, 1999, an individual well known to Respondent promised employees increased contributions to their 401(k) plan if the employees rejected the Union. The record does not support this allegation with regard to September 15, or any other date. This allegation is therefore dismissed.

Complaint Paragraph 5(j): Alleged Violations by Superintendent John Bowen on or about October 5, 1999

Prounion employee Larry Corbiel was written up for missing a day of work on October 5, 1999.[28] Corbiel testified that after giving him the write-up, Superintendent John Bowen said that he heard that Corbiel had been talking about the Union on the job and that this would not be tolerated by Niblock.

Bowen testified that he told Corbiel to "quit bugging" employee Nathan Spyker about the Union. According to Bowen, Nathan Spyker's brother, employee Ryan Spyker, complained to him, so he went to discuss the matter with Nathan Spyker. Bowen testified that Nathan Spyker told him that "Larry wouldn't take no for an answer and every chance he got he was about [sic] Nathan about joining the 150."

I dismiss the allegation in complaint paragraph 5(j)(i), that Bowen created an impression that employees' union activities were under surveillance. The General Counsel has not established that an employee in Corbiel's situation would reasonably believe that surveillance, rather than voluntary disclosures by employees, brought his solicitation on behalf of the Union to Bowen's attention, *Sage Dining Service*, 312 NLRB 845, 846 (1993).

On the other hand, I find the violation alleged in complaint paragraph 5(j)(ii), in that Bowen violated Section 8(a)(1) in instructing Corbiel not to discuss the Union with other employees, including Nathan Spyker. Corbiel, in soliciting the support of other employees for the Union, engaged in protected activity.[29] Even if I were to assume the accuracy of Bowen's hearsay testimony, I would conclude that Respondent illegally restrained and interfered with Corbiel's Section 7 rights. The fact that an employee may not want to hear a solicitation, or repeated solicitations on behalf of the Union does not negate the solicitation's protected status. This is so even if the employee subjectively considers such appeals as "harassment," *Nicholas County Health Care Center*, 331 NLRB 970 (2000). In the instant case, however, Respondent has established nothing more than the fact that Bowen found it objectionable that Corbiel was seeking support for the Union from other Niblock employees.

Alleged Unfair Labor Practices Committed on or about October 8, 1999 (Complaint Pars. 5(k) and 7(f) and (g))

The General Counsel alleges that Respondent violated Section 8(a)(1) on or about October 8, 1999, by refusing to issue keys to its Bristol facility to prounion employees, by instituting a drug testing policy and by discriminatorily requiring David Taylor to submit to a drug screen. On or about the day in question, David Taylor and Todd Plank, who were open and prominent supporters of the Union, discovered that the keys which Respondent had provided them to its facility no longer worked. Taylor and Plank had been issued such keys, as had all other operator-foremen working at Bristol.[30]

At least one operator-foreman, Wayne Andrews, had been issued new keys without asking for them when the locks were changed. Plank never asked for a new key and there is no evidence as to whether Taylor did so. Conversely, Respondent has offered no explanation as to why Taylor was not issued a new key at the same time as Andrews. I conclude that the record is insufficient to establish that Respondent failed to issue Taylor and/or Plank a key in order to interfere with, restrain or coerce them in the exercise of their Section 7 rights. I therefore dismiss complaint paragraph 5(k).

On or about the same day that Taylor discovered that his key no longer worked, he was required to submit to a drug screen. Respondent's drug screening program was instituted long before the beginning of the Union's organizing efforts. Therefore I dismiss complaint paragraph 7(f) that alleges that Niblock violated Section 8(a)(1) in instituting this policy. Paragraph 7(g) alleges that the policy was discriminatorily applied to Taylor.

As a general proposition I credit the testimony of Kevin Crouch, an estimator/project manager at Niblock, as to how Respondent's drug testing program works. Crouch determines when some of Respondent's employees are going to be tested. Testing is generally done on a monthly basis from May to November, when Niblock has a full complement of employees. Crouch enters numbers corresponding to each employee into a computer program, which selects three employees from Bristol and two–three employees from Columbia City to be tested. All five–six employees are generally tested on the same day.

On October 8, the record shows that two Bristol employees besides Taylor were selected for drug testing. Unlike the testing of Rick Storm and Kevin Weickart, discussed below, there is nothing suspicious about the timing of Taylor's selection. Other than generalized animus towards Taylor's union activities, there is nothing that suggests that his selection was other

[28] This writeup is not alleged to be an unfair labor practice.

[29] See fn. 22, supra.

[30] In 1999, Plank was no longer an operator-foreman. His change in status has not been alleged to constitute an unfair labor practice.

than random. I conclude that this is insufficient to establish discriminatory motive. I therefore dismiss complaint paragraph 7(g).

Allegations of Threats and Assault by Richard Niblock upon Larry Corbiel (Complaint Par. 5(l))

Larry Corbiel, one of the leaders of the Union's organizational drive, testified that on October 14, 1999, Richard Niblock approached him on a jobsite and started shaking his finger at Corbiel saying, "I always knew you were a piece of shit." Corbiel then testified that Niblock told him he would "get him someday," put his finger in the crease of his nose and pushed Corbiel's head back, drawing blood.

Richard Niblock's testimony regarding this incident is as follows:

> I went on the job site and he [Corbiel] was laughing at me or smiling or something, standing there, and I didn't notice him doing any work. So I stopped and talked to him about that . . . I said get your butt back to work or do something.
>
> Q. Anything else said in that conversation?
>
> A. Oh, I don't know. He said . . . smarted off to me. Said something. I can't remember what it was.
>
> Q. And what did you say?
>
> A. Just get your butt back to work, do something.

(Tr. 1138–1139.)

I find that Richard Niblock's testimony falls short of a credible denial of Corbiel's account. First of all, he failed to address Corbiel's claim of physical contact. Secondly, he never directly denied threatening Corbiel. I therefore conclude that Corbiel's account of the incident is credible. I also conclude that the threat and physical contact violated Section 8(a)(1). Although Corbiel did not specifically tie the incident to his union activity, the record does not suggest any credible alternative reason for Richard Niblock's animus towards Corbiel. Prior to this incident the Union had sent a letter to all Niblock employees with pictures of Corbiel, Taylor, Todd Plank, and Scott Cook at the top, informing employees that the Union was suing Respondent for alleged violations of the State of Indiana's prevailing wage rate laws. Thus, I conclude that Niblock's threats were related to Corbiel's union activities.

Respondent Videotapes Prounion Employees on Strike (Complaint Par. 5(m)); Discriminatory Drug Testing of Rick Storm and Kevin Weickart; The Suspension and Discharge of Kevin Weickart for his Refusal to Submit to a Drug Test (Complaint Pars. 7(h), (i), and (j))

On Tuesday, October 19, 1999, six prounion employees from the Bristol facility; Larry Corbiel, David Taylor, Todd Plank, Scott Cook, Alan Pearson, and Mark Morgan went on strike. Three prounion employees at the Columbia City facility; Michael Cramer, Rick Storm, and Kevin Weickart, went on strike the same day. Richard Niblock arranged for photographs and videotapes to be taken of the Bristol strikers. The Board has long held that absent proper justification, the photographing of employees engaged in protected activities violates the Act because it has a tendency to intimidate, *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). As no justification for the photographing and videotaping of the strikes has been offered, I conclude that Respondent violated Section 8(a)(1) as alleged in paragraph 5(m) of the complaint.

On Thursday, October 21, the strikers offered to return to work unconditionally. Cramer, Storm, and Weickart returned to work at a jobsite near Columbia City on Friday morning, October 22. Within an hour and half, Superintendent Richard Bunn appeared at this jobsite and informed Storm and Weickart that they had been selected for a drug test. Storm accompanied Bunn to the testing facility; Weickart refused to take the test and said he had to make a telephone call before deciding whether to submit to the test on another day. Area Manager Ron Modglin told Weickart that he had 5 days to decide whether to take the test.

The next day, Weickart worked a half day as did all the members of his crew. Modglin told Weickart that he had talked to Gary Niblock and Respondent was afraid that he would be able to neutralize the evidence of drugs in his system unless he submitted to the test that day. Modglin told Weickart that he would fire him if Weickart refused to take the test. Weickart again declined to submit to the drug sampling and was discharged.

I conclude that the decision to require Storm and Weickart to submit to drug testing was discriminatorily motivated. First of all, the timing of the test, immediately after the strike is suspicious. While Respondent claims that there is no set schedule for its drug testing, it has failed to offer any explanation for why tests were conducted on October 22.

Moreover, Estimator Kevin Crouch, who administers the drug testing program, testified that drug tests are generally done monthly and that employees from Bristol and Columbia City are tested on the same day. Respondent has offered no explanation for why there was drug testing on or about October 8 and again on October 22. Moreover, Crouch conceded that it is possible to assure the selection of certain employees by entering only a few numbers into the computer program. While he denies ever doing this, I do not find his denial credible.

Given the proximity to the strike, the departure from normal practice by testing twice in the same month and not testing at both facilities on the same day, I infer the "random" selection process was rigged so that union supporters were selected for testing. Respondent also had reason to suspect that Weickart might test positive, which gave it an additional reason to select Weickart and is part of the reason I conclude that his selection was not the result of a random process.[31] Niblock employees who test positive for drugs are required to undergo rehabilitation and submit to followup testing until the results are negative.

Since the decision to have drug tests on October 22, was motivated by a desire to retaliate against employees for union activity, the selection process was designed to assure the testing

[31] There were at least rumors that drug paraphernalia had been found in Weickart's truck a few weeks earlier.

Given the relatively small number of employees at Columbia City (less than 20), I assume that it is well within the realm of probability that if numbers corresponding to all the employees were put into the computer, Storm and Weickart's could have been randomly selected. However, for the reasons set forth above, I conclude a bona fide random selection did not occur.

of union strikers and Respondent did not discharge employees who failed their drug tests, I find that Kevin Weickart would not have been suspended or discharged in absence of his union activities. See *Eldeco, Inc*., 321 NLRB 857 (1996); *Wayne Mfg. Co*., 317 NLRB 1243, 1245 (1995); *CBF, Inc*., 314 NLRB 1064, 1075–1076 (1994).[32] I therefore find a violation of Section 8(a)(3) and (1) as alleged in complaint paragraphs 7(h), (i), and (j).

December 1999 Layoff of Michael Cramer and Discriminatory Change in Work Assignment (Complaint Pars. 5(n)–(w); 7(k) and (l))

Michael Cramer first worked for Niblock Excavating in the summer of 1997. After working elsewhere in 1998, he was rehired by Ron Modglin in early 1999 at Columbia City. When interviewing with Modglin and Superintendent Richard Bunn, Cramer told them he would need to be employed during the winter months. Bunn told him that he could drive a truck to Respondent's asphalt plant during the winter.

After working for Niblock for several months, Cramer was assigned to the job of paver operator and operated the paving machine for the rest of the summer. He operated the paver on prevailing wage jobs, where he made $23 per hour, compared with the $17.40 per hour that laborers were paid. The paver job also entails much less manual labor.

On August 31, 1999, Cramer was one of three employees who did not take a "union no" button in the presence of Richard and Gary Niblock, when they were placed on a table at an employee meeting. Shortly thereafter, Cramer signed a union authorization card and wore a Local 150 hat to work. On October 19, he was one three prounion Columbia City employees to go on strike for 2 days. On or about December 14 or 15, the Union sent all Niblock employees a letter, which was highly critical of Respondent. At the top of the first page were photos of eight employees, including Cramer.

A few days afterwards, on or about December 18, 1999, Richard Bunn informed Cramer that he was being laid off for the winter. Cramer asked Bunn why he was being laid off. Bunn told him the layoff was the result of the last union letter. Only three or four employees at Columbia City worked for Respondent throughout the winter of 1999–2000; Modglin, Bunn, Terry Noel, the dirt foreman, who Respondent had hired in March 1999, and possibly Mike Wittekind, the asphalt plant operator. Everyone else, including Paving Foreman Mike Wirick, was laid off until the spring.[33]

On February 7, 2000, Superintendent Richard Bunn called Cramer at home. Bunn told Cramer that he would not have been laid off had it not been for the Union's letter. On February 11, Cramer, who had worked over the winter for a union contractor, visited Modglin's barn, which was used by Respondent for storage. Bunn met Cramer there and told him again that he had screwed himself with the Union's letter but that he could "fix" everything with the Niblocks by withdrawing from Local 150. That evening Bunn called Cramer at home and repeated his suggestion over the telephone. Bunn also told Cramer that if Local 150 became the bargaining representative for Niblock, Ron Modglin could send Cramer back to the union hall and get another employee to replace him.

In early April 2000, Cramer was recalled by Respondent to work at Columbia City. His wages at Niblock were supplemented by $400 per month he was being paid by the Union as a "volunteer organizer." In 2000, Cramer mainly performed laborer's work and never ran the paver. On or about April 5, Bunn told him that he would still be running the paver if it weren't for the "union shit." Bunn also told Cramer he would be put back on the paver if he withdrew from Local 150. Later in April, Bunn told Cramer that Respondent couldn't have him running the paver if he was going out on strike.

Bunn had an number of other conversations with Cramer in April, May, and June 2000, in which he again indicated that Cramer was not running the paver due to his union affiliation and activities, and that he could get the paver job back by withdrawing from the Union in writing. On June 9, he became very angry at Cramer and accused him of giving Terry Noel's address to the Union.

I find that Respondent, by Richard Bunn, violated Section 8(a)(1) as alleged in complaint paragraphs 5(o)–(w), by restraining, coercing, and interfering with Michael Cramer's Section 7 rights by threatening and interrogating him about his union affiliation and activities. I also find Respondent violated the Act by promising Cramer benefits if he abandoned his support for the Union.

On the basis on Bunn's statements to Cramer, I also conclude that Respondent laid Cramer off in December 1999 and removed him from the paver operator's job in April 2000 because of his union activities. Thus, I conclude that Respondent violated Section 8(a)(3) and (1) as alleged in complaint paragraphs 7(k) and (l). In view of the admissions by Richard Bunn, I reject Ron Modglin's alternative explanation for the layoff, i.e., that Terry Noel had a class A commercial driver's license while Cramer only had a class B license.

Richard Bunn was called as an adverse witness by the General Counsel, but was never called by Respondent. Thus Cramer's account of his conversations with Bunn are uncontradicted. Moreover, when a party fails to call a witness who may reasonably be assumed to be favorably disposed to it, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge, *International Automated Machines*, 285 NLRB 1122, 1123 (1987). I draw such an inference and conclude that if he had been called as a witness by Respondent, Bunn's testimony under oath would have confirmed the substance of his conversations with Cramer.

[32] I decline to credit Kevin Crouch's testimony that the Respondent discharged another employee who allegedly submitted a sample of somebody else's urine and then subsequently tested positive. Given Crouch's failure to adequately explain the suspicious circumstances of the October 22 test and the lack of any specificity regarding the circumstances of this other employee's discharge, e.g., the name of the other employee who was discharged, I am unwilling to take Crouch's testimony at face value. Moreover, it appears that it would be more consistent with Respondent's drug testing policies to have required such an employee to submit to drug counseling and have a supervisor accompany the employee to all subsequent testing to assure that the employee did not cheat in submitting urine samples.

[33] Many employees desired to be laid off over the winter.

The Status of Richard Bunn

Richard Bunn was hired by Niblock in 1997 to be a working foreman. In 1998, he was promoted to superintendent.[34] Bunn reports directly to Respondent's area manager, Ron Modglin and is one of three salaried employees at Columbia City.[35] Bunn determines how work is to be performed and which pieces of equipment are to be used on a project. Bunn, Modglin, and Estimator Mike Maggert determine crew assignments. Bunn's work and his decisions are reviewed by Modglin very minimally.

Bunn supervises the paving crew foreman, Mike Wirick, an employee with 21 years of experience, and the dirt crew foreman, Terry Noel. He has the authority to resolve any differences of opinion between these foremen. The foremen are to contact Bunn if there is any problem on their jobsites they cannot handle. Bunn spends a significant amount of time driving between Niblock's jobs to check on their progress. He spends some amount of time operating equipment.[36] Bunn also provides assistance to estimator Mike Maggert, primarily in determining how many hours it will take for Niblock to complete a project.

An example of Bunn's status with regard to rank-and-file employees concerns the drug testing scheduled for Rick Storm and Kevin Weickart on October 22, 1999. Modglin put Bunn in charge of informing these employees that they were selected for drug testing and taking them to the test facility. Bunn also has the authority to discipline employees in conjunction with Modglin. Bunn has the authority to sign written disciplinary notices; the foremen do not.

Richard Bunn is clearly an agent of Respondent. A person is an agent under Board law if employees would reasonably believe that the individual was reflecting company policy and speaking and acting for management, *Community Cash Stores*, 238 NLRB 265 (1978). This is certainly true in the case of Bunn. For example, when Bunn showed up at their jobsite to tell Storm and Weickart that they were required to go for a drug test, they would reasonably believe that he was imparting this information to them on behalf of Niblock Excavating and was speaking and acting for the Niblocks and Ron Modglin.

Section 2(11) of the Act, defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Since a "supervisor" is not an "employee," a party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in Section 2(11) establishes that an individual is a supervisor. I conclude that Richard Bunn was a "supervisor" on the basis of his authority to responsibly direct employees in their work, as well as to discipline or effectively recommend the discipline of employees. Bunn's authority in these areas was not routine or clerical and did require the use of independent judgment. I would note that Bunn appears to be the Columbia City counterpart of Superintendents Roger DeBolt, John Bowen, and Gary Garrett, who Respondent concedes are supervisors at Bristol.

Refusal to Hire or Consider Brandon Taylor for Hire on or about April 4, 2000 (Complaint Par. 7(m))

Brandon Taylor, the son of prounion operator-foreman David Taylor, went to Respondent's Bristol office with his mother on about April 4, 2000, to apply for employment. The receptionist told them Niblock was not hiring. Mrs. Taylor then entered the office and asked for Julie Crawford, Respondent's secretary. Julie Crawford told Mrs. Taylor that she would talk to somebody about a job for Brandon.[37] She apparently did so since Richard Niblock became aware of the fact that Brandon Taylor was seeking employment with his company. Respondent did not offer Brandon Taylor a job.

Within 30 days of Brandon Taylor's visit to the Niblock office, Respondent hired at least five new employees. David Burkey was hired on April 6. Like Brandon Taylor, he appears to have had no prior construction experience. On April 10, Respondent hired Dale Davidhizer, who also apparently had no prior construction experience. The same day, Respondent hired Shane Stoppenhagen to work at Columbia City. The record is devoid of any indication that Stoppenhagen had any prior construction experience. The same is true of John Lukins and Jason Edwards, hired on May 1, to work at Columbia City.

Richard Niblock offered two reasons for Respondent's failure to hire Brandon Taylor. First, he "might have" considered the fact that several years previously both David Taylor and Brandon's brother were arrested for a marijuana-related offense. I find this explanation pretextual because Respondent hired a number of employees, including Michael Walton, based in part on David Taylor's recommendation, after his arrest.

[34] I conclude that Bunn has been a superintendent and statutory supervisor since at least April 1998 on the basis of the testimony of David Bogner. Moreover, Modglin testified that Bunn, but not Foreman Randy Kindig (Mike Wirick's predecessor), had the authority to sign a written warning notice issued to an employee at that time, GC Exh. 25, exhibit R-1.

[35] The other two are Modglin and Asphalt Plant Operator Mike Wittekind. Foremen Wirick and Noel are hourly employees.

[36] It is impossible to determine what percentage of his time, Bunn actually spends doing construction work. He gave two confusing and somewhat inconsistent answers to questions regarding this issue. When asked how his job duties changed when he became a superintendent, Bunn initially replied, "Was taken off the equipment a bit more. Freed up a little bit from the equipment, unless we get real super busy. Then I'm back on it." In the next breath he claimed to spend 60–65 percent of his time operating equipment. I do not find the last statement credible. In this regard, I credit Rick Storm's testimony that he saw Bunn daily and sometimes several times a day when Bunn came to his jobsite to consult with Storm's foreman.

Even Modglin operates construction equipment when Respondent is very busy.

[37] Although the testimony regarding the conversation between Mrs. Taylor and Julie Crawford is hearsay evidence, Richard Niblock's testimony confirms that he was aware that Brandon Taylor had sought employment with Respondent.

The second reason is that David Taylor did not personally recommend his son for employment or ask Respondent to hire him. I find this second rationale pretextual as well because this "requirement" for employment was applied disparately. All Richard Niblock could recall about David Burkey was that he "thinks" Burkey went to employee James Sonntag's church. He did not testify that Sonntag recommended Burkey or asked Respondent to hire him. Niblock testified that Dale Davidhizer was a friend of his daughter; he did not testify that his daughter or anyone else recommended or asked him to hire Davidhizer.

Ron Modglin's explanation for the hiring of Shane Stoppenhagen was, "trying to remember . . . I believe he was a friend of Scott Harris." Respondent has made no claim that anyone recommended or asked it to hire Stoppenhagen. Similarly, Modglin testified that John Lukins was a friend of Foreman Mike Wirick. He did not testify that Wirick recommended or asked him to hire Lukins.

Applying the *FES* criteria to Brandon Taylor, I conclude that Respondent was hiring, that Brandon Taylor was qualified for the positions Respondent was filling—since there were no qualifications other than perhaps having no known or suspected association with Local 150, and that animus towards his father's activities and/or a suspicion that Brandon Taylor might support the Union played the decisive role in Respondent decision not to hire him.[38] I therefore find that Respondent violated Section 8(a)(3) and (1) in failing and refusing to hire Brandon Taylor since April 4, 2000.

Refusal to Hire/Consider for Hire: 11 Union-Affiliated Applicants Since about May 15, 2000 (Complaint Par. 7(n))

David Taylor testified that he placed a letter recommending his son Brandon Taylor and 10 union apprentices for employment with Respondent in Gary Garrett's mailbox. Garrett denied ever receiving such a letter. I dismiss this paragraph of the complaint because the General Counsel has not established that Respondent received applications for employment from these individuals.

Refusal to Hire/Consider for Hire: Randall Patton (Complaint Par. 7(o))

Randall Patton worked for Respondent for 2 to 3 months in 1994 as a union salt. He did not disclose his union affiliation until about 3 weeks prior to the end of his employment. Patton contends he was fired by Respondent for union activity. Respondent contends he quit. Unfair labor practice charges were filed on Patton's behalf, which were settled by the General Counsel and Respondent. As part of the settlement, Niblock agreed to expunge from Patton's records two written warnings he received after his employment ended and agreed that they would not be used against him in any way.

In April 2000, Patton went to Respondent's Bristol office with 10 to 12 other Local 150 members and attempted to apply for work. He and the other members were told that Respondent was not accepting employment applications. In June, Patton sent Respondent a certified letter asking for employment. He received a return receipt but no response from Niblock.

When asked why Patton was not offered employment in June 2000, Richard Niblock, who conceded that he saw Patton's letter, testified:

> when he was working for us, he was running an off road truck and he wrecked it and we felt that he was responsible for the damage that was caused to it and then he got on a dozer and he hit one of our hydraulic excavators with a doze.

(Tr. 47.)

Richard Niblock later testified that these incidents were not the subjects of the warnings that Respondent agreed to remove from Patton's records and that he was not disciplined for these incidents. I find it incredible that Respondent would send Patton two disciplinary notices but not document incidents that were sufficiently serious that it would never consider hiring him again. Rather, I conclude that the reason given by Niblock for refusing to hire Patton is pretextual and Respondent refused to hire Patton because of his union affiliation and activities.

Applying the *FES* criteria to Patton, I find the General Counsel has established a refusal to hire violation. Respondent hired numerous employees in May, June, and July 2000. Patton, who had been a journeyman operating engineer for 7–8 years when he applied, was certainly qualified by experience and training for the positions into which these employees were hired. Respondent knew Patton was a member of Local 150 from his prior employment with Niblock. I find that antiunion animus contributed significantly to Respondent's decision not to hire Patton. It is clear from this record that Respondent went to great lengths to avoid hiring union sympathizers, particularly those it suspected would try to assist Local 150 in organizing. These efforts included discriminatorily changing its hiring procedures so as to make it nigh impossible for any union organizers, full-time or volunteers, to acquire employment with Niblock. Further, I have found Respondent's affirmative defense pretextual. The degree to which Respondent went to avoid hiring union salts and its pretextual explanation for its refusal to hire Patton establish discriminatory motivation, *Fluor Daniel, Inc*., 304 NLRB 970, 971 (1991); *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000).

Although, it is not clear when in June 2000, Patton submitted an application, there was an opening available for him regardless of when he applied. Respondent hired new employees on May 1, 8, 10, and 22; June 5, 6, and 12; and July 5. Thus, I conclude that Respondent violated Section 8(a)(3) and (1) in refusing to hire Randall Patton.

Alleged Refusal to Hire/Consider to Hire of Six Union Employees who Applied June 28, 2000 (Complaint Par. 7(p))

On June 28, 2000, union organizer Philip Overmyer sent Respondent six virtually identical letters via certified mail, return receipt requested.[39] Each letter was signed by or for a full-time

[38] It does not matter whether a refusal to hire was motivated by the union activities of the applicant or the union activities of the applicant's relative, *Crown Cork & Seal Co.*, 255 NLRB 14, 42 (1981); *Copes-Vulcan, Inc.*, 237 NLRB 1253, 1257 (1978), enfd. in pertinent part 611 F.2d 440 (3d Cir. 1979).

[39] Respondent stipulated that it received all six letters. It is unclear when they were received. This may have significance with regard whether there were job openings for the six applicants, if Niblock's 30-

employee of the Union. They were Business Agent Kenneth Welsh, Overmyer, and organizers Thomas Geffert, Randy Hill, Michael Kresge, and Delbert Watson. These letters began by reciting that the Union had been informed by the director of appeals of the NLRB's Office of General Counsel that Respondent had a "longstanding policy of hiring only former employees, friends of employees or students."

Each letter also stated that the applicant had tried to apply for work with Niblock at both the Bristol and Columbia City offices and had never been allowed to complete a job application. The letters recited that the applicant was a journeyman heavy equipment operator, who was willing to accept employment at any position, including laborer. Each letter also stated that the applicant was "known as a union sympathizer, organizer and job applicant by several of your management employees . . . I wish to ascertain how to get around your 'not-taking-applications' signs and 'not hiring' or 'not accepting applications' assertion in order to be considered for hire or hired on the same basis that others, who are not known union sympathizers, who have been considered for hire or hired." The letters ended with an attachment signed by five Niblock employees: David Taylor, Larry Corbiel, Alan Pearson, Ben Joy, and Mark Morgan recommending each applicant for employment. Niblock Excavating made no response to any of the letters.

In responding to questions from the General Counsel as to why organizer Kresge was not hired, Richard Niblock, first replied that "[w]e thought that it [the letter] looked kind of argumentative. Like he was . . . trying to get around our—some kind of hiring policy or something." This testimony is essentially a concession that Kresge and the other organizers were not considered for hire due to antiunion animus. A few moments later, Niblock added, "We must not have needed anybody at the time." Richard Niblock gave similar answers with regard to other June 28 applicants. Despite this contention, Respondent rehired Scott Harris on July 5, 2000, Brodie Delcamp on July 31, Matt Toby on August 1, Ryan Spyker on August 7, Damien Payne on August 10, David Taylor on August 13, Adam Gilbert on August 22, and Justin Stabler on August 24.

On the last day of the hearing, while testifying on direct examination, Richard Niblock added the contention that Respondent prefers to hire employees without experience over those with experience. However, he conceded that there have been exceptions to this policy. I find pretextual Richard Niblock's claim that these six applicants were not hired because Respondent has a preference for employees with no prior experience over those with experience. Not only has Niblock not uniformly adhered to this preference, it has offered no explanation as to why it gives such a preference in some cases and not others. Moreover, Ron Modglin's testimony regarding his skepticism regarding Michael Young's experience belies the assertion that Respondent holds an applicant's prior construction experience against him.[40]

The General Counsel has established a refusal-to-consider and a refusal-to-hire violation.

The General Counsel has established a refusal-to-hire violation with regard to the June 28, 2000 applicants. I have found that Respondent changed its hiring policy between March and May 1998 so that applications remained on file for only 30 days instead of 6 months. I have also found that this change was discriminatorily motivated in that it was a response to the application by Local 103 organizer Michael Young. Respondent hired more than six new employees within 6 months of its receipt of the June 28, 2000 union applications.[41] Even if the 30-day policy were not discriminatory, the General Counsel established a refusal to hire violation. Respondent hired at least one and possibly three employees within 30 days of receiving the union applications. The six union applicants are qualified to do the work performed by Respondent's employees and they were not considered for hire or hired due to their union affiliation and activities. Niblock has not established an affirmative defense to either the refusal to consider or refusal to hire.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act by:

1. Sending its February 8, 1999 letter to its employees instructing them to report to their foreman if they feel threatened or harassed by other employees soliciting them to sign union authorization cards.

2. By Richard and Gary Niblock, on about August 24 and 31, 1999, remaining in a room where they could determine which employees took a "union no" button and which employees did not do so.

3. By John Bowen, on or about October 5, 1999, in instructing Larry Corbiel to stop soliciting an employee to sign a union authorization card and/or to support the Union.

4. On about October 14, 1999, by Richard Niblock, by threatening and touching Larry Corbiel in a hostile manner due to Corbiel's union activities.

5. On about October 19, 1999, by photographing and taking videos of employees engaged in lawful picketing at Respondent's Bristol facility.

6. By Richard Bunn, on about February 7, 2000, in informing Michael Cramer that he had been laid off over the winter and had not received a raise because of his union activities.

7. By Richard Bunn, on various occasions between February and June 2000, in informing Michael Cramer that he would have worked over the winter of 1999–2000 but for his union activities, that he had been laid off due to union activity; in

day shelf life for applications was not discriminatorily motivated. Respondent hired one new employee on July 31 and another on August 1.

[40] Respondent also wanted to hire Steven Storm because of his experience as a paver operator. In assessing Respondent's motive for neither considering nor hiring the June 2000 union applicants, I note that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted, *Black Entertainment Television*, 324 NLRB 1161 (1997). I draw such an inference here.

[41] Respondent has not raised any 10(b) defenses in this case. However, Sec. 10(b) would not bar the finding of a violation in light of the application of the 30-day rule to applicants in June 2000, regardless of the fact that the Union was informed of the change in May 1998. I would also note that the record indicates that Respondent, on a number of occasions, refused to allow union applicants to update their applications.

soliciting Michael Cramer to withdraw his support for the Union; informing Michael Cramer that he would be running the paving machine were it not for his union activities; promising Cramer that he would be allowed to operate the paving machine if he renounced his affiliation with and support for the Union and interrogating Cramer about his union activities.

Respondent violated Section 8(a)(2) and (1) by rendering assistance and support to the Christian Labor Association:

1. By Richard Bunn, on February 11, 1999, in encouraging employees to sign cards authorizing the Christian Labor Association (CLA) to be their collective-bargaining representative.

2. By informing employees through its agent Chad Leiby on February 23, 1999, as to the benefits that would be granted to employees by Respondent if they chose the Christian Labor Association (CLA) as their collective-bargaining representative and by participating in the selection of a CLA representative for the operator-foremen through Richard Bunn.

3. By its agents including Richard Niblock, Ronald Modglin, Richard Bunn, and Chad Leiby in arranging for a CLA meeting on about February 25, 1999, at the Connie's Corner Restaurant in Columbia City, Indiana, in encouraging and facilitating the attendance of employees at that meeting, by compensating Chad Leiby for time spent promoting the CLA and by Richard Bunn's participation in the selection of a Columbia City representative for the CLA.

Respondent violated Section 8(a)(3) and (1) of the Act by:

1. Refusing to hire and consider for hire Michael Young since about February 1, 1999.

2. Since at least early 1999 in enforcing discriminatory hiring policies designed to exclude union members or supporters from employment, including the refusal to accept employment applications, considering employment applications for only 30 days, purporting to hire only former employees, friends of employees or students, and purporting to favor employees with no experience over union supporters with experience.

3. Requiring Rick Storm and Kevin Weickart to submit to a drug screen on about October 22, 1999.

4. Suspending and discharging Kevin Weickart on about October 22 and 23, 1999, for his refusal to submit to a discriminatorily motivated drug screen.

5. Laying off Michael Cramer for the winter on about December 22, 1999.

6. Removing Michael Cramer for the job of paver operator since April 4, 2000.

7. Refusing to hire or consider for hire Brandon Taylor since April 4, 2000.

8. Refusing to rehire or consider for hire Randall Patton since about June 12, 2000.

9. Refusing to hire or consider for hire since June 28, 2000, Thomas Geffert, Randy Hill, Michael Kresge, Philip Overmyer, Delbert Watson, and Kenneth Welsh.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Kevin Weickart, discriminatorily laid off, demoted and denied a raise to Michael Cramer, and having discriminatorily refused to hire other employees, it must offer them reinstatement or instatement, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement or instatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed *in New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]